

***United States Court of Appeals  
for the Second Circuit***



**BRIEF FOR  
APPELLEE**





77-1315

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TO BE ARGUED BY:  
CAROL MELLOR

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

-----X  
UNITED STATES OF AMERICA,

Appellant, .

PAUL LABRIOLA and THOMAS  
CONTINO,

Appellees.  
-----X

ON APPEAL FROM THE UNITED STATES DISTRICT  
COURT FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR APPELLEE  
LABRIOLA

CAROL MELLOR  
Attorney for Paul Labriola  
Office and P.O. Address  
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Brooklyn, New York 11201  
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UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

- - - - - x

UNITED STATES OF AMERICA,

Appellant

PAUL LABRIOLA and THOMAS  
CONTINO,

Appellees.

- - - - - x

BRIEF FOR APPELLEE LABRIOLA

I.

PRELIMINARY STATEMENT

The Government appeals from an Order and Decision entered in the United States District Court, Eastern District of New York (Costantino, U.S.D.J.) on the 28th day of June, 1977, dismissing Indictment 75 CR 659S against defendant Paul Labriola on the ground that the Government violated the terms of the Interstate Agreement on Detainers (18 U S.C. App.) which mandates, upon such violation, dismissal of the Indictment with prejudice.

Contending that the District Court erred in relying upon the unique factual background of this proceeding, and in applying equitable principles applicable because of those circumstances, in its decision on this matter, the Government



asks this Court to remand this case to the District Court for a decision "on the merits" and as alternative but related relief, to withhold decision in this proceeding pending Supreme Court consideration of this Court's decision in United States v. Mauro, 544 F. 2d 588 (2 Cir. 1976), cert. granted 10/3/77 (Hereinafter referred to as "Mauro").

Defendant Labriola contends that the District Court was correct in its ruling and that this Court should not withhold decision on this appeal.

2. ISSUES PRESENTED

1. Did the District Court commit reversible error in holding that the Second Circuit's interpretation of the Interstate Agreement on Detainers in Mauro is applicable and controlling to the facts herein?

2. Is the Government precluded from now asking that it be given an opportunity to develop an issue, i.e., factual differences between defendant Labriola's circumstances and the situation presented to this Court in Mauro, abandoned and never presented by it to the District Court?

3. Should the decision in this matter await the Supreme Court's consideration of Mauro?



In September, 1975 Defendant Labriola was charged in an Indictment (75 CR 659) with the crime of conspiracy to violate 18 U.S.C. §495 (forging and uttering U.S. Savings Bonds). A motion was made in January of 1976 by defendant Labriola and other defendants to dismiss the conspiracy Indictment on the grounds of double jeopardy. The Government never responded to this motion, choosing, instead, after a three month delay, to file a superseding Indictment charging only substantive counts of violation of 18 U.S.C. §495 (75 CR 659S). The original indictment was thereupon dismissed.

Prior to the filing of the superseding indictment, defendant Labriola was incarcerated by the State of New York to serve a sentence imposed pursuant to a Judgment of the Supreme Court of the State of New York, County of New York, convicting him, on his plea of guilty, of the crime of larceny in the first degree (not, as the Government contends, robbery). A writ of habeas corpus ad prosequendum issued on March 25, 1976, and defendant Labriola was brought into federal jurisdiction pursuant to that writ to answer to the charge contained in Indictment 75 CR 659S. He was returned to



state custody on April 7, 1976, without having been tried on the federal charges.

Thereafter, in April of 1976, defendant Labriola moved the District Court, inter alia, for dismissal of the Indictment on the grounds of denial of a speedy trial. That motion was denied, and on April 29, 1976, jurors were selected and sworn.

Prior to the taking of any testimony and on May 5, 1976 defendant Labriola moved, pro se, for an Order dismissing the Indictment on the ground that the Government had violated the Interstate Agreement on Detainers, alleging he had been taken from state custody, where he had been serving a state sentence, brought into federal custody to answer to federal charges, and had been returned to the state untried.

On May 12, 1976, defendant Contino made a similar motion, and argument was heard on both motions on May 12, 1976.

During the argument on the Interstate Agreement on Detainers motion, it was indicated to the Court that a similar motion had been recently decided by Judge Bartels, U.S.D.J., E.D.N.Y. (A 66-67). In fact, the decisions of Judge Bartels, in United States v. Mauro and United States v. Fusco, were not entered until May 17, 1976. The District Court decided that, in view of Judge Bartel's decision, and the imminency of an appeal therefrom should Judge Bartels adhere to his decision



after a pending motion to re-argue was heard, he would "put this case over until such time the Court of Appeals does decide the motion" (A-73). The Court predicated this mode of procedure upon the defendants' waiving their speedy trial rights (which they did (A-76-77)) and the Government's assent (which it did (A-73)).

The attorney for the Government, at the argument on May 12, 1976, mentioned that she felt there were factual distinctions between Labriola's situation and that of Contino, Mauro and Fusco. The Government, however, submitted no affidavit or other evidentiary material in support of the alleged factual distinctions. Labriola's defense counsel suggested that if the Government wished to argue a factual distinction, a hearing should be held to develop the relevant facts (A-72). The Government did not request such a hearing.

When, on May 12, 1976, the procedure to delay the decision of the motions brought under the Interstate Agreement on Detainers was agreed to, the Trial Court envisaged that two weeks would be sufficient time in which to receive a ruling by the United States Court of Appeals for the Second Circuit on the Mauro decision (A-74, 93). The case was adjourned to June 4 for status report, and was thereafter adjourned on numerous occasions to await the Mauro decision. Even when, in October the Second Circuit Court of Appeals decided Mauro, the District



Court chose to wait to see if en banc consideration would be given to Mauro (A-102).

Defendant Labriola, moving pro se on November 1, 1976 filed a 120-day demand pursuant to the Interstate Agreement Act, Article IV-c. That provision requires that a receiving state commence trial within 120 days after receipt of the prisoner within its jurisdiction. Article V(c) imposes the penalty of dismissal of the Indictment with prejudice upon failure to bring the prisoner to trial within the time limits provided in Article IV.

It was defendant Labriola's position that the waiver of the speedy trial provisions was entered into with the understanding that it would be effective only until June 7 (A-116), the date the District Court originally contemplated for the beginning of the trial (A-93). The Government argued that

"Our intention would be that the waiver existed at the time of the agreement to hold further decisions in this case pending the decision of Mauro!"

(A-117)

The Second Circuit Court of Appeals denied en banc consideration to Mauro on March 15, 1977. On April 19, 1977, the Government filed a memorandum of law limited to the argument that Mauro should not have applicability to this case on



principles of retroactivity. No attempt was made by the Government to argue, present or show to the District Court any factual distinction between the facts in Mauro and Labriola's situation. The Government, in its memorandum, stated

"Concededly, both Labriola and Contino were serving State sentences on March 30, 1976 when brought to this court pursuant to writs of habeas corpus ad prosequendum, . . .

(a) Labriola: On December 9, 1974, he was sentenced to a term of 4-8 years for robbery in the first degree (sic)\* by the Supreme Court of the State of New York (N.Y. County). He began service of this sentence on March 19, 1976, at Rikers Island, Rikers Island, New York. On March 30, 1976, as noted above, he was brought from Rikers Island to this court by U.S. Marshalls and on April 7, 1976 returned to Rikers Island. On April 20, 1976, Labriola was transferred by State authorities to Sing Sing Prison, Ossining (sic) New York. Thereafter, on April 26, 1976, pursuant to a new writ of habeas corpus ad prosequendum, Labriola was taken from Sing Sing Prison into federal custody for trial on Indictment 75 CR 659(S), scheduled to commence, April 26, 1976."

Government's Memorandum  
of Law, p. 1.  
(A-136)

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\* The crime was larceny.

In spite of the fact that the Government had indicated to the Court orally on December 10, 1976, that they would be presenting an argument based on factual differences between Mauro and Labriola, no such argument was presented or even intimated, either in the memorandum, or on oral argument held on May 4, 1977.

Thereafter, on June 28, 1977 the District Court dismissed the Indictment with prejudice for violation of the Interstate Agreement on Detainers (A-33-36).

#### POINT I

THE COURT WAS CORRECT IN  
HOLDING THAT THE PRINCIPLES  
OF NON-RETROACTIVITY CANNOT,  
IN JUSTICE AND FAIRNESS, BE  
APPLIED TO THE CIRCUMSTANCES  
OF THIS CASE.

a. The Court correctly rejected the Government's argument that the holding of Mauro should be non-retroactive and thus not applied to this case. The Government's argument, the only one presented to the District Court by the Government, would result in dismissals of Indictments for violation of the Interstate Agreement on Detainers only if that violation occurred after October 26, 1976, the date of decision in Mauro. (A-141).



The Court rejected that argument because the Court had expressly withheld decision in this case for more than one year in order to receive the guidance of the Second Circuit as to the proper interpretation of the Interstate Agreement on Detainers. The defendants, pursuant to this agreement to withhold decision, waived their speedy trial rights, and, even when defendant Labriola attempted to withdraw that waiver because of the inordinate length of time that had elapsed, the Government argued that he was bound by his "agreement". (A-117).

The Court's decision makes clear that it had been the Court's intention that the agreement to withhold decision contemplated "that the Court of Appeals' ruling in Mauro would be dispositive of these motions." (A-34). When, after the Mauro decision was made final, and the Government offered no factual distinctions between this case and Mauro, affirmatively conceding\* that the situation was on all fours with

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\*Compare:

"Concededly, both Labriola and Contino were serving sentences on March 30, 1976 when brought to this court pursuant to writs of habeas corpus ad prosequendum...

(a) Labriola...He began service of this sentence on March 19, 1976, at Rikers Island, Rikers Island, New York.

(footnote continued on  
next page)

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On March 30, 1976, as noted above, he was brought from Rikers Island to this Court by U.S. Marshalls and on April 7, 1976, returned to Rikers Island...Thereafter, on April 26, 1976, pursuant to a new writ of habeas corpus ad prosequendum, Labriola was taken from Sing Sing Prison into federal custody for trial..."

Government's Memorandum  
of Law, p. 1.  
(A-136)

to

"Fusco did all that was required of him to claim his remedy under Article IV(e) - 'allege that one jurisdiction has requested his transfer from another jurisdiction for trial and returned him without trying him to the first jurisdiction.'

United States v. Cappucci,  
342 F. Supp. 790, 793  
(E.D. Pa. 1972)"

United States v. Mauro  
544 F. 2d 588 (2d Cir.  
1976) 591 n. 3.



the fact pattern in Mauro, the Court considered, and rejected the non-retroactivity argument postulated by the Government.

The Court rejected this argument because, upon the facts here presented, application thereof would be unequitable and unjust. The Court had itself indicated that the interpretation of the Agreement as announced by the Second Circuit would be dispositive. Pursuant to this indication, the defendants waived their speedy trial rights, previously asserted by them, for a time span which was envisioned, at the time of the waivers, to last two weeks but which extended over a one year period, from May 12, 1976 to June 28, 1977.

To hold, after this extremely lengthy delay, that the awaited Mauro decision would not apply to this case, in view of the waiver extracted from the defendants on the understanding that the Mauro decision would apply, would have been and would be unconscionable. At the very least, as was noted by the Trial Court, the validity of the waivers would be highly questionable.

It must be remembered that the Government consented to the procedure by which the disposition of this

case would await interpretation of the Agreement by the Second Circuit Court of Appeals (A-73). When defendant Labriola attempted to withdraw his waiver, the Government agreed that he should be held to his "agreement." (A-117). So, too, should the Government be held to its agreement. The Government stipulated to adjournment of a proceeding pending decision on an identical issue by a higher court. When the decision was unfavorable to it, the Government argued that the decision was inapplicable to this proceeding not because of any distinction between the two cases, but solely because the Government had mis-interpreted the statute and was, therefore, surprised and caught unawares by the interpretation of the statute by the Court of Appeals.

In view of the consent by the Government to the procedure followed by the District Court, the Court held that the Government was estopped from arguing the non-retroactivity of Mauro. Even if, on strict principles of equity, the Government is not estopped from arguing non-retroactivity, the Court is certainly estopped from deciding, in these circumstances, that Mauro is not dispositive of this matter. As the Court itself pointed out, it "made abundantly clear" on May 12, 1976 that "this Court intended that the Court of Appeals' ruling in Mauro would be dispositive"



(Decision p. 3, A-35). If the Government had any objection to that course of action, it should have so indicated. Instead, it consented. (A-73).

The Government argues that the District Court's decision reflects a "confession of error" on the part of the Government to be bound to the Mauro decision. The District Court did not so hold. It had been presented with one and only one argument by the Government on this issue of application of Mauro to this case. It decided that this argument, i.e., non-retroactivity of Mauro, could not be applied to this case because of the unique circumstances presented herein. Thus, the District Court declined to decide the broad issue of retroactivity of Mauro and held that application of Mauro could not be denied to the facts here presented.

One of the reasons that Mauro has to be applied to the facts herein is that, by withholding decision, the Court prevented this case from arriving at the Second Circuit Court of Appeals at the same time as Mauro, presumably to have been decided therewith and in conformity thereto.

Rule 3(b) of the Federal Rules of Appellate Procedure provides that

"Appeals may be consolidated by order of the court of appeals upon its own motion or upon motion of a party, or by stipulation of the parties to the several appeals."

F.R.A.P. Rule 3(b)

Mauro itself was a consolidated appeal, joining the identical issues presented by Mauro and United States v. Fusco. Presumably, had the District Court decided these motions, presented to it on May 12, 1976 (prior to the filing of the Mauro decision in the District Court), in due course, there would have been a timely appeal and consolidation of this appeal with Mauro. Decision was withheld in this matter only to allow the District Court the benefit of the wisdom of the Second Circuit Court of Appeals on the interpretation of the statute.

To say, after a year's delay, that Mauro does not apply to this case, not because the Agreement was not violated herein, but because the Government misinterpreted the statute, would be patently unjust.

The District Court held that denial of application of Mauro to this case on principles of retroactivity would be unequitable, unfair, unjust and would cast serious doubt on the validity of the defendants' waivers of their speedy trial rights. In view of the waiver of his speedy trial rights by Labriola, after prior assertion thereof; the consent to this procedure by the Government; the Government's position that Labriola could not re-assert his speedy trial rights and other



Agreement rights by virtue of his waiver; and the Court's clear statement that the interpretation of the Agreement by the Second Circuit would be dispositive of this matter, the Court was correct in deciding that principles of retroactivity could not preclude application of Mauro to the disposition of this matter.

b. The Government argues that this case should be sent back to the District Court for consideration of the factual distinctions, a ruling on the retroactivity of Mauro, and consideration of United States v. Chico, 558 F.2d 1047 (2d Cir. 1977)

None of these issues merit or require a remand of this matter.

During the year that defendant Labriola waited for a decision, based on Mauro, the Government twice indicated that it felt factual differences distinguished Labriola's situation from Mauro. On May 12, 1976, the attorney for the Government indicated that she "would argue that before your Honor" (A-107). When, however, the Mauro decision became final, the Government, abandoning any contention of factual distinction, submitted a memorandum addressed to one issue and one issue only, that of retroactivity. More indicative of the Government's position, and its clear abandonment of any claim of factual distinction, is the fact pattern set forth by it in that memorandum.



The Government, on page 1 of its memorandum, conceded that Labriola was serving a state sentence, that he was brought to the district court by habeas corpus ad prosequendum, and, in developing the factual background, admits that he was returned to state custody, untried (A-136). No mention is made of any factual distinction between Labriola and Mauro, and none is contained in the facts as set forth by the Government. As was noted above, no argument in the memorandum is addressed to a factual distinction, and no mention is made to such a distinction on the argument held on May 4, 1977 (A-109-132).

Factual differences were not "continually argued" as is stated by the Government in its Brief to this Court. (Brief for Appellant, p. 8, n. 11). On the contrary, the Government clearly abandoned whatever claim it might have had that there were factual distinctions\* and cannot now be

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\*Defendant Labriola by no means intends to imply that such factual distinctions do, in fact, exist. Suffice it to point out to this Court that Labriola expressly voiced his desire to remain in federal jurisdiction on the date he was brought from state prison to federal court (A-59-60). He was kept in federal custody for one week before he was returned, over his objection. Defendant Labriola seeks, however, final disposition of this case which initiated over two years ago and therefore argues against further remand.



heard to complain because the arguments it did present to the District Court were rejected by it.

As was stated by the Circuit Court of Appeals for the Seventh Circuit,

"Where parties, even in a criminal case, knowingly and deliberately turn down a course of procedure which at the time appears to be to their best interest, they cannot be permitted at a later time after a decision has been rendered adverse to them, to obtain a retrial according to the procedure which they had voluntarily discarded and waived."

United States v. Cook  
432 F. 2d 1093  
(7th Cir. 1970).

Certainly the Government, in April of 1977, by failing to present, raise or argue any factual distinction between Labriola's circumstances and those considered in Mauro, had knowingly and deliberately chosen to proceed along the course evidenced by its memorandum of law, and oral argument, i.e., to argue non-retroactivity of Mauro. The District Court, correctly, rejected the non-retroactivity argument as applied to these facts. The Government cannot now seek an opportunity to proceed along a course that it had previously abandoned.

The Second Circuit, in considering a defendant-appellant's request that it remand a case for a hearing on the



issue of whether a juror had been influenced by a certain incident, responded to the Government's argument that the defendants had waived this point by failing to seek action prior to the discharge of the jury by stating:

"The latter argument would indeed be persuasive if defense counsel had known of the incident before the case was submitted to the jury or while it was deliberating, but had nevertheless stood mute, gambling on an acquittal while holding this issue in reserve."

United States v. Gersh,  
328 F. 2d 460, 463  
(2d Cir. 1964).

Here, the Government gambled that its retroactivity argument would be persuasive. It lost the gamble, and now seeks re-hearing on an issue which it had never fully developed and, which it had, by the time the issue was submitted to the District Court for determination, abandoned.

Most pertinent to this issue is the complete lack and absence of any affidavit or other documentary or testimonial evidence submitted or proffered by the Government on this issue. Indeed, it was the very lack of evidence to support its claim that compelled the Circuit Court in United States v. Gersh, supra, to deny appellant's request for a remand. The Court in Gersh, decided that the defendant had not, in that case, "gambled"



for it did not discover the existence of the incident in time or under circumstances that would place upon it the burden of bringing the incident to the Court's attention with respect to the issue of a possible juror influence. The request for a hearing was denied, however, because the defendants had not requested a hearing below, seeking instead only a mistrial, and had not presented any affidavits or other evidence to support its claim. United States v. Gersh, supra at 463-4. So, too, should the lack of any evidentiary support for the Government's claims of factual differences preclude a remand to the District Court for consideration of issues never heretofore adequately presented to it.

On the question of retroactivity of Mauro, defendant Labriola contends, as is more fully set out in Point I(a) supra, that the District Court's reason for rejection of that argument as applied to this case was fully justified and correct, and that the circumstances herein do not require broad consideration of the retroactive application of Mauro.

Lastly, the Government seeks consideration of the decision in United States v. Chico to Labriola's circumstances. In Chico, the Second Circuit decided that, in a situation where a state prisoner was brought into federal jurisdiction merely long enough to be arraigned, and was then returned to state

jurisdiction, without ever having been held at any place of imprisonment within the federal jurisdiction, the Act was not violated. United States v. Chico supra, at 1048-9.

Inasmuch as Labriola was held in the federal jurisdiction for nearly a week, the holding of Chico is without application.

The District Court committed no reversible error in its decision below, nor is there any justification for remand of this matter for further proceedings. Therefore, the Order of the District Court should be affirmed.

#### POINT II

THIS COURT SHOULD NOT HOLD  
THE DECISION OF THIS APPEAL  
IN ABEYANCE PENDING HEARING  
OF MAURO BY THE UNITED STATES  
SUPREME COURT.

The agreement entered into between the Court, defendants and the Government on April 12, 1976 clearly contemplated reservation of decision pending the Second Circuit Court of Appeal's determination of Mauro. (See, Decision of the District Court, p. 2-3 A-34-35). Pursuant to that agreement, the defendants stood under the shadow of an unresolved criminal proceeding for over one year, unable, by virtue of their waiver of their speedy trial rights, to seek or obtain



resolution of the charges against them. There comes a time, in every litigation, when the proceedings should terminate, and that time has clearly arrived in this case.

The Government asks this Court to hold this matter in abeyance pending Supreme Court determination of Mauro on the speculative premise that the Supreme Court might decide that this Court erred in its interpretation of Mauro, and that, even if Mauro is affirmed, the Supreme Court might deem Mauro to be non-retroactive. As was fully discussed in Point I, supra, the unique factual circumstances of this case are such as to mandate application of Mauro to this matter, even if, as a general supposition, Mauro is deemed non-retroactive.

There seems to be no justification for further delaying the final determination of this matter. Defendants were first charged by the Government in September of 1975, over two years ago. Speedy trial rights, both under the Speedy Trial Act and the Interstate Agreement on Detainers were waived by defendant Labriola on the justifiable assumption that such waiver would be for a two week period. Instead, a full year passed prior to decision of the motion to dismiss the Indictment.

The reasons for adoption of the Interstate Agreement

on Detainers and the abuses it sought to prevent include the elimination of the uncertainty and the disabilities accruing to sentenced prisoners by reason of the pendency of unresolved criminal charges. United States v. Ford, 550 F. 2d 732, 737-741 (2d Cir. 1977). These same uncertainties will attend any further delay in the determination of this matter.

At this time, Mauro is the law of this Circuit, and, as was discussed above, Mauro is fully applicable and dispositive of the issues presented in this appeal. In view of the fact that defendant Labriola waived his speedy trial rights pending a decision by this Court in Mauro, and that decision requires dismissal of the Indictment against Labriola, law and justice require that the Order of the District Court be affirmed.

### POINT III

DEFENDANT LABRIOLA RESPECT-  
FULLY JOINS IN AND INCORPORATES  
BY REFERENCE SUCH OF THE POINTS  
AND ARGUMENTS CONTAINED IN CO-  
DEFENDANT'S BRIEF AS ARE APPLIC-  
ABLE TO HIM.

### CONCLUSION

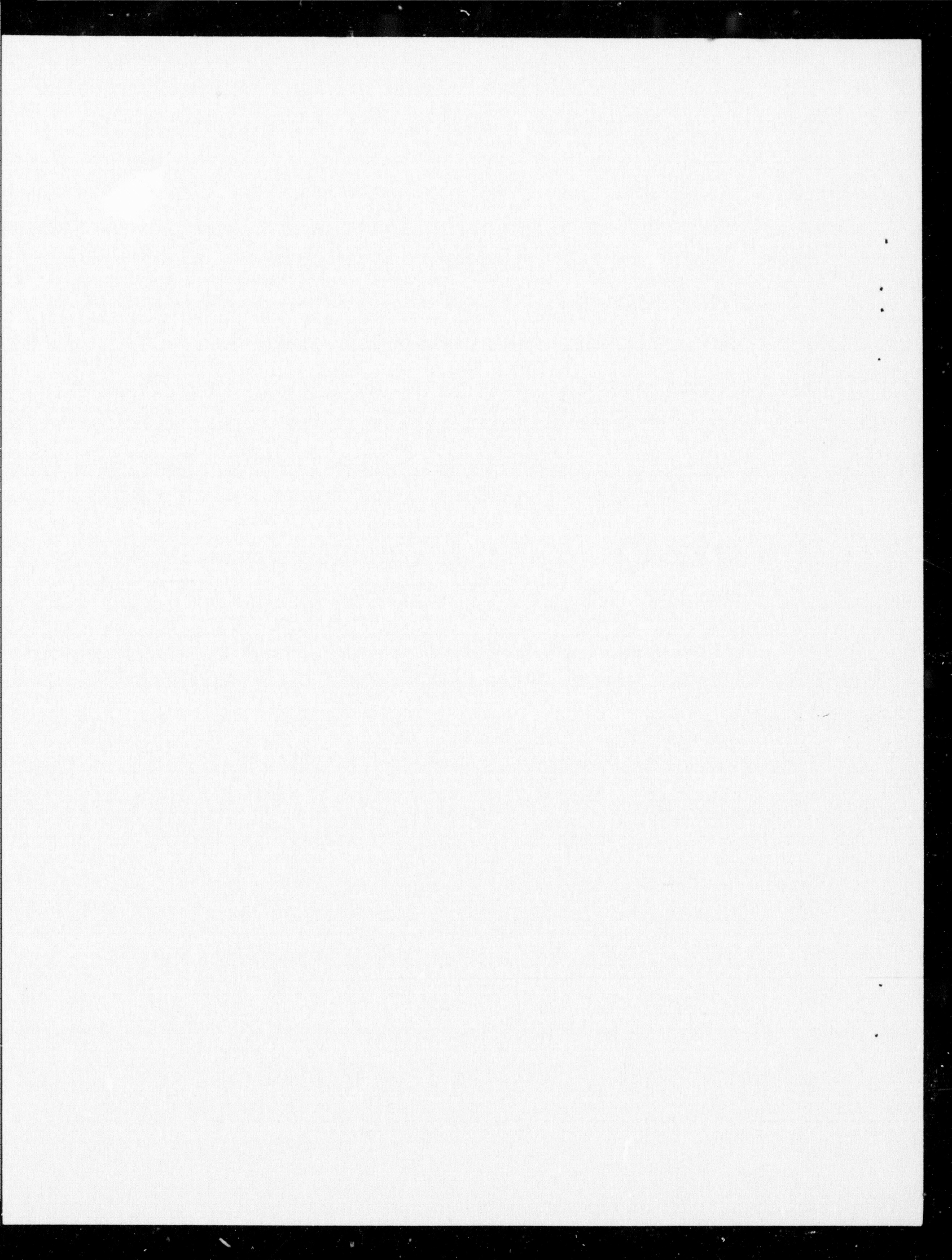
For the foregoing reasons, the Order of the District Court should be in all respects affirmed.

Respectfully submitted,

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October 31, 1977







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